United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, TUSCAN AVIATION BRANCH, Tuscan, AZ, Employer	)	**Docket No. 08-2418** **Issued: June 18, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2008 appellant filed a timely appeal from October 3, 2007 and June 10, 2008 decisions of the Office of Workers' Compensation Programs denying merit review. Because more than one year has elapsed from the last merit decision dated April 27, 2007 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office, in its decisions dated October 3, 2007 and June 10, 2008, properly denied merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 2006 appellant, then a 52-year-old pilot and supervisory air interdiction agent, filed an occupational disease claim alleging that he sustained work-related

hearing loss. In a statement dated September 16, 2006, he stated that he was exposed to aircraft noise for over 30 years while working for the U.S. Air Force from May 1976 through August 8, 1987, the Treasury Department from November 1987 through October 2003 and as pilot with the employing establishment from October 2003 to present. In a September 20, 2006 letter, the employing establishment provided information regarding appellant's work-related exposure to hazardous noise.

In a January 25, 2007 letter, the Office notified appellant of the deficiencies in his claim and that a second opinion examination was required. In a January 25, 2007 statement of accepted facts, the employing establishment noted that appellant was exposed to occupational noise levels above 85 decibels since October 2003 while working for the employing establishment.

Appellant submitted May 30, 2002, May 19, 2003 and September 11, 2006 audiogram reports and a June 21, 2002 and June 11, 2003 notification of audiogram results from the Department of Health and Human Services.

On February 14, 2007 appellant was examined by a second opinion physician, Dr. Eugene P. Falk, a Board-certified otolaryngologist. An audiological examination revealed normal hearing except for greater than 4,000 Hertz (Hz), which Dr. Falk stated was consistent with appellant's age. Dr. Falk opined that there was no evidence of noise trauma and that appellant had normal hearing. He also submitted audiogram results dated February 14, 2007 and a calibration certificate.

By letter dated March 27, 2007, the Office provided Dr. Falk with an additional audiological evaluation including a tympanometry test dated March 21, 2007 and requested he provide additional comments regarding appellant's hearing loss.[1]

On March 28, 2007 Dr. Falk provided a handwritten notation stating that appellant's tympanometry was normal and that his diagnosis remained the same as provided in his February 14, 2007 medical report.

By decision dated April 27, 2007, the Office denied appellant's claim on the grounds that he did not establish, with rationalized medical evidence, that his hearing loss was related to the accepted employment factors.

On July 12, 2007 appellant filed a request for reconsideration on the merits. In a July 11, 2007 statement, he contended that he only spent about five minutes with the second opinion physician before being sent to a hearing test. About two weeks later, appellant was required to take another hearing test. He was never seen by the physician at this second appointment. Appellant further stated that his private physician had noticed some hearing loss and that his

[1] From the March 21, 2007 audiogram, it appears as though appellant sustained a 20, 10, 15 and 15 decibel loss in his left ear and a 20, 15, 15 and 20 decibel loss in his right ear at 500, 1,000, 2,000 and 3,000 Hz, respectively. According to the hearing loss formula provided in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant would have a zero percent permanent impairment due to hearing loss. *See* A.M.A., *Guides*, 250 (5th ed. 2001). *See also Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

audiogram results show hearing loss in the higher frequencies. He also alleged that the Office did not properly review his medical records.

Appellant further submitted duplicate copies of the February 14 and March 21, 2007 audiogram results and their corresponding calibration certificates and a copy of Dr. Falk's February 14, 2007 medical report. He also provided the June 21, 2002 and June 11, 2003 audiogram notification letters from the Department of Health and Human Services and audiogram reports dated May 30, 2002, May 19, 2003 and September 11, 2006.

By decision dated October 3, 2007, the Office denied appellant's request for reconsideration on the grounds that he did not submit any new or relevant evidence or make an argument demonstrating error in fact or law. It found that the new evidence was irrelevant, immaterial, cumulative or repetitious and that his statement only discussed his feelings that the second opinion physician did not properly evaluate his record.

On April 7, 2008 appellant filed a request for reconsideration of the merits. He also provided military medical reports dated June 1974 through August 1987, which included several audiogram reports.

By decision dated June 10, 2008, the Office denied appellant's request for reconsideration finding that the submitted medical reports were immaterial, as they did not provide an affirmative medical opinion on causal relationship. It noted that diagnostic data alone was insufficient to overcome the denial of his claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[4]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[5] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[6] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8128(a).

[4] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[5] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.606(b)(2).

application for review within one year of the date of that decision.[7] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[8]

ANALYSIS

The issue is whether the Office properly denied appellant's requests for reconsideration in its October 3, 2007 and June 10, 2008 decisions.

The Board finds that the Office properly denied appellant's request for reconsideration in its October 3, 2007 decision. Appellant submitted audiogram reports from the employing establishment dated May 30, 2002, May 19, 2003 and September 11, 2006 and notifications of audiogram results from the Department of Health and Human Services dated June 21, 2002 and June 11, 2003. He also submitted a copy of Dr. Falk's February 14, 2007 medical report and audiogram results dated February 14 and March 21, 2007 with their corresponding calibration certificates. However, these records are duplicative of evidence already contained in the record and reviewed by the Office and do not constitute a sufficient basis for further merit review.[9]

Further, in a July 12, 2007 statement, appellant contended that Dr. Falk's examination was deficient and that the Office did not properly review his records. He also maintained that his hearing tests show a high frequency hearing loss and that his private physician has noticed hearing loss. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[10] Because appellant did not provide any support for his allegation regarding the deficiencies of Dr. Falk's examination or the Office's failure to properly review the record, the Board finds that these arguments do not have reasonable color of validity.[11] Moreover, appellant's argument that his hearing tests show a high frequency hearing loss and that his physician has noticed hearing loss is irrelevant to the underlying issue. The issue that remains is not whether appellant sustained a hearing loss, but rather whether his civilian federal employment factors caused a hearing loss. Appellant's arguments pertain to the fact that he sustained a hearing loss as opposed to the relevant issue regarding causation.[12] Notably, he failed to provide any relevant medical evidence from his private physician in support of his

[7] *Id*. at § 10.607(a).

[8] *Id*. at § 10.608(b).

[9] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *Richard Yadron*, 57 ECAB 207 (2005); *Eugene Butler*, 36 ECAB 393 (1984).

[10] *M.E.*, 58 ECAB ___ (Docket 07-1189, issued September 20, 2007).

[11] *See Jennifer A. Guillary*, 57 ECAB 485 (2006).

[12] The Board notes that the Office evaluates hearing loss in accordance with the standards contained in the A.M.A., *Guides*. In order to show a ratable hearing loss under this standard, a claimant must have a hearing loss greater than 25 decibels when averaging the loss at 500, 1,000, 2,000 and 3,000 Hz. Thus, high decibel hearing loss above 3000 Hz is generally not compensable. *See* A.M.A., *Guides* 250. *Donald E. Stockstad*, 53 ECAB 301, *petition for recon. granted (modifying prior decision)* (Docket No. 01-1570, issued August 13, 2002).

claim. Thus, the Board finds that the Office properly denied appellant's July 12, 2007 request for reconsideration because appellant did not submit any relevant and pertinent new evidence or advance a relevant legal argument.

The Board further finds the Office properly denied appellant's request for reconsideration in its June 10, 2008 decision. With his April 7, 2008 request for reconsideration, appellant submitted military medical records dated June 1974 through August 1987. These military records are irrelevant to the issue of whether appellant sustained a hearing loss due to his civilian federal employment factors. The Act provides that compensation shall be paid "for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."[13] "Employee" is defined as "a civilian officer or employee" of the Government of the United States.[14] A person must show that the injury occurred "while in the performance of his duty" as a civilian employee.[15] There is separate legislation providing benefits for veterans who become disabled as a result of an injury sustained in line of military duty.[16] As these medical records only pertain to appellant's health and hearing while he served in the military, they are not relevant to show that he sustained any hearing loss due to his civilian federal employment years after his military discharge.[17]

The Board finds that appellant did not show that the Office erroneously applied a specific point of law, advance a relevant, previously unconsidered legal argument or constitute relevant and pertinent new evidence. Thus, the Office properly denied merit review in its October 7, 2003 and June 10, 2008 decisions.

CONCLUSION

The Board finds that the Office, in its decisions dated October 7, 2003 and June 10, 2008, properly denied merit review pursuant to 5 U.S.C. § 8128(a).

[13] 5 U.S.C. § 8102(a).

[14] *Id*. at § 8101(1).

[15] *Duane G. Jackson*, 23 ECAB 217 (1972).

[16] *See* 38 U.S.C. §§ 1101-1163. *See also id.*

[17] Submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. *Patricia G. Aiken*, 57 ECAB 441 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2008 and October 3, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board